IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21-8-2006

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

Writ Petition Nos.6769 of 1998

The Management,
2716 Sencottai Primary Agricultural Co-Op. Bank,
Sencottai,
rep.by its President Ahamed Meeran ... Petitioner

Vs.

1. Deputy Commissioner of Labour
(Appellate Authority under Tamil Nadu
Shops & Establishment Act),
Tirunelveli - 627 002.

2. S.Mariappan ... Respondents

Prayer: Writ petition filed under Article 226 of Constitution of India, praying this Court to issue a writ of certiorari to call for the records made in the impugned order Tamilnadu Shops and Establishment Act Case No.3/96 dated 2.4.1998 on the file of the first respondent, received by the petitioner on 27.4.1998 and quash the same.

For Petitioner : Ms.G.Lakshmi

For 1st Respondent : Mrs.C.K.Vishnupriya
Government Advocate

For 2nd Respondent : Mr.S.Silambanan

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O R D E R

Petitioner Management seeks to quash the order passed by the Deputy Commissioner of Labour/the first respondent herein dated 2.4.1998 made in Tamil Nadu Shops and Establishment Act Case No.3 of 1996.

2. The second respondent was employed as Clerk in the Petitioner Bank. Apart from the petitioner, one Secretary by name

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Mohammed Mydeen and one Assistant were also employed in the petitioner Bank. According to the petitioner Bank, the second respondent and the Secretary conspired together and committed criminal misappropriation of Bank's funds and caused loss to the extent of Rs.59,620/- in the Fertilizer Account and Rs.1,66,000/- in the disbursement of jewel loans from the accounts of the petitioner Bank. The second respondent was suspended from service on 14.6.1995 and a charge memo was issued to him. The second respondent submitted an explanation and the same having been found not satisfactory, a domestic enquiry was conducted and the second respondent also participated in the enquiry. The Enquiry Officer found the charges against the second respondent as proved and accepting the said finding, the Management dismissed the second respondent and the said Secretary Mohammed Mydeen by order dated 7.2.1996. Aggrieved by the dismissal order, the second respondent preferred an appeal before the first respondent under Section 41 of the Tamil Nadu Shops and Establishment Act in case No.3 of 1996. The first respondent, while considering the appeal found that the second respondent was not given subsistence allowance during the period of suspension till the date of dismissal and non-payment of the same vitiates the disciplinary proceeding initiated by the petitioner/Management against the second respondent and ordered reinstatement by order dated 2.4.1998. The said order is challenged in this writ petition.

3. The learned counsel for the petitioner Management submitted that the second respondent having committed the misappropriation and caused loss to the petitioner Bank along with the Secretary, was proceeded departmentally in accordance with law and the interference made by the first respondent, who is the appellate authority, on the ground that the second respondent has not been paid subsistence allowance, is illegal and therefore the order of the first respondent is to be set aside.

4. The learned counsel appearing for the second respondent submitted that the second respondent was not paid the subsistence allowance and no documentary evidence was produced to prove the payment of subsistence allowance and due to the non-payment of the same, the second respondent was prejudiced as he could not get the legal assistance/opinion of the legally trained person to defend his case before the Enquiry Officer. The learned counsel also submitted that there are several judgments of the Honourable Supreme Court and of this Court on the point that non-payment of subsistence allowance will cause prejudice to the workman in the conduct of enquiry and the consequential order of termination cannot stand.

5. I have considered the rival submissions of the learned counsel for the petitioner as well as the respective counsels for the respondents.

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6. The point for consideration is, whether the order of the appellate authority setting aside the order of dismissal, on the ground that the failure to give the subsistence allowance by the petitioner management to the second respondent during the period of suspension vitiates the enquiry and the consequential dismissal order and also on the fact that the Secretary Mohammed Mydeen accepted the responsibility for the deficit and paid the loss sustained by the Society, among other things, is sustainable.

7. The second respondent is a clerk who was suspended from service by the petitioner Management on 14.6.1995 and he was dismissed from service by order dated 7.2.1996. The non-payment of subsistence allowance during the said period to the second respondent is also accepted, as no proof was submitted before the appellate authority by the petitioner Management to establish the fact of payment of subsistence allowance. Even during the hearing of this writ petition, I directed the petitioner Management to prove the payment of subsistence allowance to the second respondent, but no proof was filed. It is also not the case of the petitioner that the second respondent is having other sources of income. Therefore, the finding given by the first respondent that the petitioner Management had not paid the subsistence allowance to the second respondent is perfectly legal.

8. The next point to be considered is whether due to the non payment of the subsistence allowance any prejudice was caused to the second respondent in participating in the enquiry proceeding and in defending his case.

9. The non-payment of subsistence allowance during the period of suspension and pending proceeding in departmental enquiry was condemned by the Honourable Supreme Court in the following decisions.

(a) In (1987) 4 SCC 328 (O.P.Gupta v. Union of India) at para 15, the Honourable Supreme Court held as follows,

> "An order of suspension of a government servant does not put an end to his service under the Government. He continues to be a member of the service in spite of the order of suspension. The real effect of suspension as explained by this Court in Khem Chand v. Union of India (AIR 1958 SC 300) is that he continues to be a member of the government service but is not permitted to work and further during the period of suspension he is paid only some allowance – generally called subsistence allowance – which is normally less than the salary instead of the pay and allowances he would have been entitled to if he had not been

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suspended. There is no doubt that an order of suspension, unless the departmental enquiry is concluded withn a reasonable time, affects a government servant injuriously. The very expression 'subsistence allowance' has an undeniable penal significance. The dictionary meaning of the word 'subsist' as given in Shorter Oxford 'English Dictionary, Vol. II at p.2171 is 'to remain alive as on food; to continue to exist'. 'Subsistence' means - means of supporting life, especially a minimum livelihood."

(b) In the decision reported in (1999) 3 SCC 679 = AIR 1999 SC 1416 (M.Paul Anthony v. Bharat Gold Mines Ltd) in paragraphs 30 to 33 the Honourable Supreme Court held thus,

"30. If, therefore, even that amount is not paid, then the very object of paying the reduced salary to the employee during the period of suspension would be frustrated. The act of non-payment of subsistence allowance can be likened to slow-poisoning as the employee, if not permitted to sustain himself on account of non-payment of subsistence allowance, would gradually starve himself to death.

31. ..... The fundamental rights, including the right to life under Article 21 of the Constitution or the basic human rights are not surrendered by the employee. The provision for payment of subsistence allowance made in the service rules only ensures non-violation of the right to life of the employee. That was the reason why this Court in State of Maharashtra v. Chandrabhan Tale ((1983) 3 SCC 387) struck down a service rule which provided for payment of a nominal amount of rupee one as subsistence allowance to an employee placed under suspension. .....

32. The question whether the appellant was unable to go to Kolar Gold Fields to participate in the enquiry proceedings on account of non-payment of subsistence allowance may not have been raised before the enquiry officer, but it was positively raised before the High Court and has also been raised before us. Since it is not disputed that subsistence allowance was not paid

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to the appellant during the pendency of the departmental proceedings, we have to take strong notice of it, particularly as it is not suggested by the respondents that the appellant had any other source of income."

33. Since in the instant case the appellant was not provided any subsistence allowance during the period of suspension and the adjournment prayed for by him on account of his illness, duly supported by medical certificates, was refused resulting in ex parte proceedings against him, we are of the opinion that the appellant has been punished in total violation of the principles of natural justice and he was literally not afforded any opportunity of hearing. Moreover, as pleaded by the appellant before the High Court as also before us that on account of his penury occasioned by non-payment of subsistence allowance, he could not undertake a journey to attend the disciplinary proceedings, the findings recorded by the enquiry officer at such proceedings, which were held ex parte, stand vitiated."

(c) In the decision reported in (2000) 7 SCC 90 (Jagdamba Prasad Shukla v. State of U.P. And others) at para 8 the Honourable Supreme Court held thus,

"8. The payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance. No justifiable ground has been made out for non-payment of the subsistence allowance all through the period of suspension i.e., from suspension till removal. One of the reasons for not appearing in inquiry as intimated to the authorities was the financial crunch on account of non-payment of subsistence allowance and the other was the illness of the appellant. The appellant in reply to the show-cause notice stated that even if he was to appear in inquiry against medical advice, he was unable to appear for want of funds on account of non-payment of subsistence allowance. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the appellant to defend himself in the

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departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service are quashed."

10. The second respondent is a low paid employee, who is also not well versed in the legal implications with regard to the departmental enquiry. It is natural that the second respondent is bound to get legal assistance/opinion from the legally trained person, and at least for that the second respondent is entitled to receive a subsistence allowance. In the light of the said factual aspect, the non-payment of the subsistence allowance to the second respondent naturally vitiates the enquiry as the second respondent was prevented from getting the minimum legal assistance, which caused prejudice to the second respondent. Therefore, the enquiry conducted without paying subsistence allowance to the second respondent and the consequential dismissal order passed by the management are vitiated.

11. The next issue is, as the monetary loss sustained by the Petitioner management has been made good by the then Secretary viz., Mohammed Mydeen, whether the second respondent can be treated as exonerated from the charges. Whether the second respondent is also responsible or the said Mohammed Mydeen alone is responsible for the loss sustained by the petitioner Bank, has to be decided factually by the Enquiry Officer or by the first respondent. The appellate authority found that the Petitioner Management has not examined the Special Officer as a witness before the Enquiry Officer or before him. The Special Officer is an important witness, who used to assign work to the staff members of the bank. Hence the appellate authority set aside the order of dismissal both on the ground of non-availability of evidence and also on the ground of non-payment of subsistence allowance.

12. The petitioner Management obtained interim stay of the award of reinstatement on 6.5.1998 and the same was made absolute on 4.1.2000 on condition that the petitioner management shall deposit Rs.1,00,000/- to the credit of Case No.3 of 1996 on the file of first respondent and the same shall be invested in a fixed deposit in a Nationalised Bank and the interest shall be paid to the second respondent once in a quarter and the management shall also pay at the rate of Rs.2,019/- comencing from February till the disposal of the writ petition on or before 10th of every English calendar month. Therefore, the second respondent is not working in the petitioner Bank as on date.

13. Taking note of the said factual aspect and also the prejudice caused to the second respondent in not paying the subsistence allowance, I am of the firm view that the enquiry conducted against the second respondent by the petitioner Bank and the consequential dismissal order are vitiated and the order of the

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first respondent in setting aside the same is valid. However, taking note of the seriousness of the charges and in view of the fact that mere acceptance of the loss by the then Secretary Mohammed Mydeen will not absolve the second respondent, it is open to the petitioner management to conduct fresh enquiry against the second respondent, if it is warranted. If the petitioner Management choose to continue the proceedings against the second respondent it shall do so and complete the same within three months from the date of receipt of copy of this order. The interim order passed by this Court on 4.1.2000 shall continue to be in operation and if the second respondent is absolved from the charges or if the management is deciding not to initiate fresh proceedings against the second respondent, reinstatement ordered by the first respondent will come into operation after three months.

The writ petition is disposed of in the above terms. No costs.

vr

Sd/-
Asst. Registrar

//true copy//

Sub Asst.Registrar

To

The Deputy Commissioner of Labour,
(Appellate Authority under Tamil Nadu Shops
& Establishment Act),
Tirunelveli - 627 002.

+ one cc to Mr.R.S.Ramanathan, Advocate Sr.No.37507.

PLI (CO)
RSM/6.9.2006

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